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No. 87-234

In the Supreme Court of the United States

OCTOBER TERM, 1987

THOMAS ROBERTS AND HAIG ARAKELIAN, PETITIONERS

v.

WILLIAM E. BROCK, SECRETARY OF LABOR, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Whether the Federal Employees' Compensation Act (FECA), which makes the Secretary of Labor's decision allowing or denying a payment under FECA "final and conclusive for all purposes and with respect to all questions of law or fact * * * and not subject to review * * * by a court" (5 U.S.C. 8128(b)), precludes judicial review of a nonconstitutional challenge to the Secretary's interpretation of a FECA provision.

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v.

WILLIAM E. BROCK, SECRETARY OF LABOR, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-21a) is reported at 813 F.2d 524. The decisions of the district court (Pet. App. 33a-53a, 67a-77a) are unreported.

JURISDICTION

The judgment of the court of appeals (Pet. App. 22a-23a) was entered on March 12, 1987, and rehearing was denied on May 8, 1987 (Pet. App. 24a-25a). The petition for a writ of certiorari was filed on August 6, 1987. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The Federal Employees' Compensation Act (FECA), 5 U.S.C. (& Supp. III) 8101 *et seq.*, provides a comprehensive system of workers' compensation benefits for federal employees who are killed or injured in the per-

formance of their duties. These statutory benefits substitute for "all other liability of the United States * * * to the employee * * * because of the injury or death." 5 U.S.C. 8116(c). See *Johansen* v. *United States,* 343 U.S. 427 (1952). In addition, with certain exceptions not relevant here, FECA prohibits the dual receipt of FECA compensation and "remuneration of any type from the United States." It also requires federal employees to elect between FECA compensation and other death or injury benefits to which they may be entitled under another federal statute, such as federal civil service disability retirement benefits. 5 U.S.C. 8116(a) and (b). See also 5 U.S.C. 8337(f).

The Secretary of Labor is authorized by statute to "administer, and decide all questions arising under" FECA. 5 U.S.C. 8145. The Secretary receives and investigates claims, conducts hearings, and "makes an award for or against payment of compensation * * *." 5 U.S.C. 8121, 8124. After this initial action, the Secretary "may review an award for or against payment of compensation at any time," and may "end, decrease, or increase the compensation previously awarded," or "award compensation previously refused or discontinued." 5 U.S.C. 8128(a). The statute also provides that the courts are without jurisdiction to review the Secretary's actions with respect to FECA payments: "The action of the Secretary * * * in allowing or denying a payment * * * is (1) final and conclusive for all purposes and with respect to all questions of law or fact; and (2) not subject to review * * * by a court by mandamus or otherwise." 5 U.S.C. 8128(b).

2. The two petitioners are Massachusetts National Guard technicians who receive Massachusetts disability retirement benefits for work-related injuries. Until 1969, National Guard technicians such as petitioners were considered state employees, and were not eligible for federal civil service retirement benefits. The Secretary of Labor nevertheless had treated them as eligible for FECA

benefits. S. Rep. 1446, 90th Cong., 2d Sess. 2, 4 (1968); H.R. Rep. 1823, 90th Cong., 2d Sess. 4, 7 (1968). In 1968, Congress enacted the National Guard Technicians Act (NGTA), 32 U.S.C. 709, which converted technicians from state to federal employees and brought them into the federal retirement system. Persons then serving as technicians were permitted to elect continued state retirement coverage "in lieu of" federal civil service retirement benefits. S. Rep. 1446, *supra,* at 3, 14; H.R. Rep. 1823, *supra,* at 20. Following enactment of the legislation, technicians who elected state retirement coverage were allowed to receive FECA benefits in addition to state disability benefits for the same illness or injury (Pet. App. 5a).

Thereafter, the Secretary issued policy directives to effectuate the NGTA's conversion of technicians from state to federal employment status. FECA Program Memorandum No. 242, issued on July 14, 1978, prohibits National Guard technicians from receiving both FECA and state disability benefits for the same injury or illness, and requires the technicians to elect between the two forms of benefits. FECA Program Memorandum No. 262, issued on May 7, 1980, provides that the policy set out in FECA Memorandum 242 is to be applied prospectively only, to technicians whose FECA claims were adjudicated after July 14, 1978, the date of the earlier Memorandum (Pet. App. 5a-6a, 34a).

Petitioner Roberts was injured on April 12, 1978, and his eligibility for FECA benefits was finally decided on or about August 17, 1978, after the effective date of Program Memorandum No. 242. He received FECA benefits until November 30, 1980, when the Secretary ended his benefits in accordance with Program Memorandum No. 262 (J.A. 81-82).[1] Petitioner Arakelian was injured in 1975.

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[1] The facts were stipulated by the parties in the district court (J.A. 73-87).

His eligibility for FECA benefits was finally adjudicated in 1979, after the effective date of Program Memorandum No. 242, and he accordingly was denied benefits (J.A. 83).

In 1980, petitioners brought a class action alleging that the Secretary's interpretation of FECA exceeded his statutory authority and deprived them of their constitutional right to equal protection of the laws (Pet. App. 6a, 10a-11a, 34a-35a, 37a-38a). Petitioners alleged jurisdiction under 28 U.S.C. 1331(a) and 1361. They sought recovery of FECA payments that had been denied under the Secretary's policy directives, as well as declaratory and injunctive relief (J.A. 9-10, 33-35).

The district court denied the Secretary's motion to dismiss petitioners' claims on jurisdictional grounds (Pet. App. 67a). Premising its jurisdiction on 28 U.S.C. 1331 (Pet. App. 34a), the district court held that Section 8128(b) of FECA does not preclude judicial review of either statutory or constitutional claims of the type asserted by petitioners (Pet. App. 67a-77a). The court concluded that the language of Section 8128(b) is not "clear and convincing evidence of congressional intent to preclude judicial review" of a claim which, in the court's view, challenges a generally applicable agency policy rather than a specific action allowing or denying a FECA payment (Pet. App. 74a-75a). In reaching that conclusion, the district court relied on several court of appeals decisions holding that certain statutory challenges to Veterans Administration benefits decisions were not immune from judicial review under 38 U.S.C. 211(a) (Pet. App. 69a-73a).

After certifying a nationwide class (Pet. App. 54a-66a), the district court held that the Secretary was "without statutory authority to issue Memorandum No. 242 because that Memorandum misinterpreted the statutory scheme established by Congress" (*id.* at 53a). The district

court therefore ordered the Secretary to pay all FECA payments that had been withheld under Memorandum 242 and to take affirmative steps to identify and notify all class members of their right to apply for dual benefits (*id.* at 26a-32a). The Secretary appealed.

3. The court of appeals vacated the district court decision on jurisdictional grounds, concluding that in Section 8128(b) "Congress gave the Secretary of Labor the unequivocal power to interpret and apply the FECA without 'review by another official of the United States or by a court,' " unless that power is used in an unconstitutional manner (Pet. App. 16a).[2] FECA, the court of appeals continued, gives no right to appeal compensation decisions on statutory grounds, "whether these decisions are made individually or through broad-impact changes in policy" (*ibid.*). The court therefore held that petitioners' proposed reading of the statutory phrase "action of the Secretary * * * in allowing or denying a payment"—under which review would be precluded only of individual adjudications—"distorts the statute" (*id.* at 14a) because the Secretary's issuance of a "FECA Memorandum is simply a wholesale 'action * * * in allowing or denying a payment.' 5 U.S.C. § 8128(b)" (*id.* at 16a). The court also noted that petitioners' reading of Section 8128(b) "would create the absurd result of permitting a court to strike down a policy statement of the Secretary, notwithstanding the court's inability to review any subsequent individual adjudications

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[2] The court of appeals also held that 5 U.S.C. 8128(b) does not preclude judicial review of petitioners' particular constitutional challenge because, even though petitioners will have a "difficult time invalidating the policy" in light of the "rational basis" test for equal protection claims (Pet. App. 11a, 13a), their claim is not " 'so attenuated and unsubstantial as to be absolutely devoid of merit' " (*id.* at 10a (citation omitted)). The court accordingly remanded the case to the district court to decide petitioners' equal protection claims. This aspect of the case is not before this Court.

for conformance with its policy decision" (Pet. App. 14a). And the court found that petitioners' reading of the preclusion provision "conflicts with one of the major purposes of § 8128(b): 'that the Secretary should be free to make the policy choices associated with disability decisions' " (*id.* at 15a-16a (citation omitted)).

The court of appeals also rejected petitioners' attempt to ground jurisdiction on *United States* v. *Lorenzetti*, 467 U.S. 167 (1984), in which this Court reviewed the Secretary's attempt to obtain reimbursement of a state tort judgment from a FECA recipient pursuant to Section 8132. The court of appeals explained that in *Lorenzetti* the Secretary already had allowed payment of FECA benefits; the subject of the litigation in that case was the recipient's obligation to reimburse the Secretary out of a tort settlement recovered from a third party, a question as to which review is not precluded by Section 8128(b) (Pet. App. 20a-21a).[3]

ARGUMENT

The decision of the court of appeals is correct and, as petitioners appear to concede (Pet. 37, 46), does not conflict with any decision of this Court or of another court of appeals interpreting FECA. Review by this Court therefore is not warranted.

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[3] The court of appeals also rejected the district court's reliance on decisions extending judicial review of veterans' benefits decisions under 38 U.S.C. 211(a) (*Wayne State University* v. *Cleland*, 590 F.2d 627, 631-632 (6th Cir. 1978); *University of Maryland* v. *Cleland*, 621 F.2d 98, 100-101 (4th Cir. 1980); *Merged Area X (Education)* v. *Cleland*, 604 F.2d 1075, 1078 (8th Cir. 1979); *Evergreen State College* v. *Cleland*, 621 F.2d 1002, 1008 (9th Cir. 1980)), finding the recent contrary decisions in *Traynor* v. *Walters*, 791 F.2d 226 (2d Cir. 1986), cert. granted *sub nom. Traynor* v. *Turnage*, No. 86-622 (Mar. 9, 1987), and *Roberts* v. *Walters*, 792 F.2d 1109 (Fed. Cir. 1986), more persuasive (Pet. App. 17a).

1. As this Court has often stated, the general presumption that Congress intends to permit judicial review of administrative action may be overcome by "clear and convincing evidence" of a contrary legislative intent. *Bowen* v. *Michigan Academy of Family Physicians*, 476 U.S. 667, 670-672 (1986); *Abbott Laboratories* v. *Gardner*, 387 U.S. 136, 141 (1967). Such congressional intent may be evidenced by specific statutory language, by legislative history, or "by inferences of intent drawn from the statutory scheme as a whole." *Block* v. *Community Nutrition Institute*, 467 U.S. 340, 349 (1984). FECA provides the strongest possible evidence of such congressional intent—express statutory language precluding review. Indeed, Congress would be hard pressed to preclude judicial review of the Secretary's compensation decisions under FECA any more clearly than it has in 5 U.S.C. 8128(b). That section explicitly removes from "review * * * by a court by mandamus or otherwise" any "action of the Secretary * * * in allowing or denying a payment under this subchapter [5 U.S.C. (& Supp. III) 8101 *et seq.*]." The Secretary's action is "final and conclusive for *all* purposes and with respect to *all* questions of law and fact." 5 U.S.C. 8128(b) (emphasis added).

This language, like the language in the Voting Rights Act that this Court construed in *Briscoe* v. *Bell*, 432 U.S. 404, 409-410 (1977), "could hardly prohibit judicial review in more explicit terms. * * * [It] is absolute on its face and would appear to admit of no exception." In fact, as the court of appeals noted (Pet. App. 17a), this Court recently cited 5 U.S.C. 8128(b) as an example of a statute including the kind of "unambiguous and comprehensive" language that Congress "typically employs" when it "intends to bar judicial review altogether." *Lindahl* v. *Office of Personnel Management*, 470 U.S. 768, 779-780 & n.13 (1985). The Court thus indicated that Section 8128(b), in contrast to the statute under review in *Lindahl*, was a "completely

preclusive" provision that imposed an "absolute bar to judicial review" (470 U.S. at 779).[4] It is therefore not surprising that the courts of appeals have repeatedly held that Section 8128(b) precludes judicial review of the Secretary's decisions to allow or deny FECA payments, even when generally applicable questions of law are involved.[5]

Petitioners attempt to avoid Section 8128(b)'s preclusionary language by characterizing their challenge to the Secretary's denial of FECA payments in this case as a facial attack on the National Guard technician policy memoranda themselves, arguing that the location of Section 8128(b) in the FECA statutory scheme (following a description of the Secretary's claims adjudication process in 5 U.S.C. 8119-8124) impliedly limits its preclusive effect to individual claims adjudications (Pet. 25-29). The record

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[4] Contrary to petitioner's suggestion (Pet. 40-42), a grant of certiorari is not necessary to clarify the Court's comment in *Lindahl* regarding Section 8128(b). *Lindahl* addressed the proper interpretation of a judicial review provision of the Civil Service Retirement Act, 5 U.S.C. 8347(c). The Court mentioned Section 8128(b) of FECA solely for comparative purposes as an example of preclusionary language intended by Congress "to bar judicial review altogether." 470 U.S. at 779-780 & n.13. The court of appeals in this case appropriately cited the *Lindahl* comment as support for its independent analysis of Section 8128(b), not as having controlling effect.

[5] See, *e.g.*, *Hamby* v. *Janer*, 808 F.2d 1433 (11th Cir. 1987) (finding no jurisdiction to review Secretary's award of attorneys' fees to representative of FECA claimant); *DiPippa* v. *United States*, 687 F.2d 14, 16-17 (3d Cir. 1982) (Secretary's interpretation of FECA as covering adverse reactions to agency-sponsored swine flu inoculations is "absolutely immune from judicial review"); *Calderon* v. *Tobin*, 187 F.2d 514 (D.C. Cir.), cert. denied, 341 U.S. 935 (1951) (refusing to review Secretary's determination that FECA claimant was not covered "widow"). Also, the courts have consistently held that the Secretary's FECA coverage decisions cannot be challenged under the Federal Tort Claims Act. See, *e.g.*, *Grijalva* v. *United States*, 781 F.2d 472, 474 (5th Cir. 1986), cert. denied, No. 85-2000 (Oct. 6, 1986); *Heilman* v. *United States*, 731 F.2d 1104, 1109 (3d Cir. 1984); *Gill* v. *United States*, 641 F.2d 195, 197 (5th Cir. 1981); *Waters* v. *United States*, 458 F.2d 20, 22 (5th Cir. 1972).

here demonstrates, however, that petitioners' attempt to obtain judicial review in fact involved challenges to individual benefits determinations. Both petitioners were denied benefits by the Secretary under 5 U.S.C. 8124(a) and 8128(a) (Pet. App. 82a-83a). The Secretary "ma[d]e an award * * * against payment of compensation" to petitioner Arakelian (5 U.S.C. 8124(a)) and "on his own motion * * * end[ed] * * * [petitioner Roberts'] compensation previously awarded." 5 U.S.C. 8128(a). Petitioners now seek to recover those benefits, both for themselves and for the class they represent (J.A. 34). They therefore literally are seeking judicial review of "the action of the Secretary * * * denying a payment under [FECA]"—precisely the type of action that Congress made final and unreviewable in Section 8128(b). The nature of petitioners' claims is changed neither by their request for declaratory and injunctive relief nor by the certification of a class.

Moreover, as the court of appeals recognized, even if petitioners' suit is viewed as a challenge to the policy memoranda alone, those memoranda are simply a "wholesale action" denying FECA payments to a group of similarly situated, actual and potential FECA claimants (Pet. App. 16a). The Secretary could have chosen to deny duplicative FECA benefits to National Guard technicians exclusively through case-by-case adjudication rather than by issuing a general policy directive. See *NAACP* v. *FPC*, 425 U.S. 662, 668 (1976); *SEC* v. *Chenery Corp.*, 332 U.S. 194, 202-203 (1947). Had he done so, his decisions denying payments concededly would have been immune from judicial review under 5 U.S.C. 8128(b). There is no principled reason for a different result when the Secretary first articulates a position in a policy memorandum and then applies it in individual cases.[6] In sum, petitioners cite no

[6] Absent the general policy directives, the Secretary's decisions would have been immune from review even if they were inconsistent from case to case. This factor argues in favor of encouraging the

legislative history,[7] no FECA case, and no logical reason compelling a departure from the court of appeals' sensible analysis.

2. Petitioners also erroneously contend (Pet. 37-39) that the decision of the court of appeals conflicts "indirectly" with this Court's decision in *United States* v. *Lorenzetti,* 467 U.S. 167 (1984). In *Lorenzetti,* the Court, without addressing the preclusion of review provision, considered the Secretary's right under Section 8132 to obtain the reimbursement of FECA benefits from an employee who had received a tort recovery from a third party for the same injury that gave rise to the payments under FECA. As the court of appeals correctly explained (Pet. App. 18a-20a), *Lorenzetti* plainly is distinguishable

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Secretary to issue and to follow generally applicable policies in the administration of FECA. Indeed, as the court below pointed out (Pet. App. 14a), it makes no sense to have the policy directives judicially reviewable since it was Congress's intent that any subsequent individual adjudications not be reviewable.

[7] As noted by petitioners (Pet. 28-29 n.13), there is no contemporaneous legislative history of the preclusion language in Section 8128(b), which was added by Congress without comment as part of a broader amendment in 1945. Act of July 28, 1945, ch. 328, § 4, 59 Stat. 504. Despite the absence of an express preclusion of review provision in the original FECA (Act of Sept. 7, 1916, ch. 458, § 37, 39 Stat. 749), however, in 1923 and 1924 both the Attorney General, 33 Op. Att'y Gen. 476 (1923), and Congress expressed the view that the decisions of the Employees' Compensation Commission (which administered FECA at that time) were "final" and not subject to review "either by the courts or other Federal authority." H.R. Rep. 280, 68th Cong., 1st Sess. 2 (1924). The 1945 amendment expressly incorporated that longstanding consensus on the unreviewability of FECA decisions. In 1966, this view was reflected once again in the legislative history of an amendment providing for an informal hearing before the Secretary at the request of a claimant, where Congress noted that the amendment did not "seek to disturb the role of the Employees' Compensation Appeals Board [within the Department of Labor] *as the arena of final arbitrament of claims.*" H.R. Rep. 1304, 89th Cong., 2d Sess. 3-4 (1966) (emphasis added).

because it did not involve a challenge to the Secretary's action in "allowing or denying a payment"—the type of action as to which review is precluded by Section 8128(b). Rather, in *Lorenzetti* the Secretary had already allowed the payment of FECA benefits, and the judicial challenge involved the exercise of his separate statutory right under 5 U.S.C. 8132 to obtain reimbursement of those benefits out of a tort settlement. See 467 U.S. at 169-171. Petitioners' insistence that the Court found jurisdiction in *Lorenzetti* because the claimant in that case sought "review of the compliance with FECA of a generally applicable agency rule or policy imposed by the Secretary" (Pet. 39) finds no support in the language or reasoning of that decision. Indeed, it is hardly likely that this Court would have effected such a sweeping revision of the FECA preclusion of review provision without discussion. And, as the court below noted, this Court subsequently made no mention of such a limit on preclusion when describing Section 8128(b) in *Lindahl* (Pet. App. 19a-20a).

3. Finally, petitioners assert (Pet. 42-48) that this case is so closely related to *Traynor* v. *Turnage,* cert. granted, No. 86-622 (Mar. 9, 1987), that review should be granted here "so that this Court may preserve the effect of its decision in *Traynor*" (Pet. 48). This suggestion is without merit. *Traynor* involves 38 U.S.C. 211(a),[8] which precludes review of "the decisions of the Administrator on any question of law or fact under any law administered by the Veterans' Administration providing benefits for

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[8] 38 U.S.C. 211(a) provides, in pertinent part:

> [T]he decisions of the Administrator on any question of law or fact under any law administered by the Veterans' Administration providing benefits for veterans and their dependents or survivors shall be final and conclusive and no other official or any court of the United States shall have power or jurisdiction to review any such decision by an action in the nature of mandamus of otherwise.

veterans * * *." In both *Traynor* and its companion case, *McKelvey* v. *Turnage,* 792 F.2d 194 (D.C. Cir. 1986), cert. granted, No. 86-737 (Mar. 9. 1987), claimants assert that certain Veterans' Administration regulations discriminate impermissibly on the basis of handicap in violation of the Rehabilitation Act of 1973, 29 U.S.C. 794. Among other things, the claimants in *Traynor* accordingly argue, as the dissenting judge in that case put it, that such a discrimination claim arises "under" the Rehabilitation Act rather than "under any law administered by the Veterans' Administration providing benefits for veterans," so as to take it outside the scope of the preclusionary language of 38 U.S.C. 211(a). *Traynor* v. *Walters,* 791 F.2d at 231-233 (Kearse, J., dissenting).

In contrast, Section 8128(b) (emphasis added) makes the Secretary's decision in FECA cases final as "to *all* questions of law and fact"—and does not even arguably limit preclusion to cases arising under any particular statute or set of statutes. In this case, moreover, it is the interpretation of FECA itself, rather than of any other statute, that is dispositive (see Pet. App. 44a-47a, 50a-52a). Accordingly, the Court's decision in *Traynor* (even if it accepts the claimants' reading of Section 211(a)) is unlikely to be of any assistance to petitioners here.[9]

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[9] Petitioners also point (Pet. 42-48) to a conflict in the circuits on whether judicial challenges to regulations promulgated by the Veterans' Administration are foreclosed by Section 211(a). As petitioners evidently recognize (Pet. 46), however, there is no such conflict concerning the meaning of Section 8128(b). And because the interpretation of each statute must turn on its language and legislative history, there is no need for review of a case involving Section 8128(b) unless a conflict develops on the meaning of that statute. It should be added that petitioners substantially overstate the case in suggesting that the court below found decisions interpreting Section 211(a) "to be controlling" (Pet. 46); the court's brief discussion of Section 211(a) was hardly essential to its holding. See Pet. App. 17a.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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